Supreme Court, U.S.
FILED
SEP 19 1997
CLERK

(3)

No. 97-322

In The

Supreme Court of the United States

October Term, 1996

KAREN F. ALEXANDER,

Petitioner,

v.

CHRISTINE TODD WHITMAN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

PETER VERNIERO
Attorney General of New Jersey
Attorney for Respondents Christine Todd Whitman and Peter Verniero
RICHARD J. HUGHES JUSTICE COMPLEX
P.O. Box 112
Trenton, New Jersey 08625
(973) 648-4730

ANDREA M. SILKOWITZ
Assistant Attorney General
Of Counsel and On the Brief
(*Counsel of Record*)

PATRICIA A. SCHIRIPO
Deputy Attorney General
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly concluded that the challenge to the classifications set forth in the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 *et seq.*, and the New Jersey Survival statute, N.J.S.A. 2A:15-3, – denying a derivative cause of action on behalf of stillborn fetuses – failed to state a claim under the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution?

2. Whether the Court below correctly dismissed the complaint insofar as it asserted the existence of constitutional rights of a stillborn fetus under the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

THE COURT OF APPEALS PROPERLY REJECTED THE WITHIN CHALLENGE TO THE CONSTITUTIONALITY OF N.J.S.A. 2A:31-1 *ET SEQ.* AND N.J.S.A. 2A:15-3 UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 5

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES CITED

Alfone v. Sarno, 168 N.J. Super. 315 403 A.2d 9 (App. Div.), mod. on other grds., 87 N.J. 99, 432 A.2d 857 (1979) 6

Carey v. Lovett, 132 N.J. 44, 622 A.2d 1279 (1993) 7

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 16

Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) 12, 15, 19

Eisenstadt v. Baird, 405 U.S. 438 (1972)..... 11

Federal Communications Comm. v. Beach Communications, Inc., 508 U.S. 307 (1993) 12

Giardina v. Bennett, 111 N.J. 412, 545 A.2d 139 (1988) ..... *passim*

Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968) 16, 17, 18, 19

Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964) 7, 14, 16

Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980) 7

Hudgins v. Serrano, 186 N.J. Super. 465, 453 A.2d 218 (App. Div. 1982)..... 6

Justus v. Atchinson, 565 P.2d 122 (Cal. 1977)..... 15

Lassiter v. Dept. Of Social Serv., 452 U.S. 18 (1981) 11

Levy v. Louisiana, 391 U.S. 68 (1986)..... 16, 17, 18

Loving v. Virginia, 388 U.S. 1 (1967) 11

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976)..... 12, 13

TABLE OF AUTHORITIES – Continued

Page

McGarvey v. Magee-Womens Hosp., 340 F. Supp. 751 (W.D. Pa. 1972), *aff'd*, 474 F.2d 1339 (3d Cir. 1973) 10

McGowan v. Maryland, 336 U.S. 420 (1961) 13, 16

Meyer v. Nebraska, 262 U.S. 390 (1923) 11

Parham v. Hughes, 441 U.S. 347 (1979) 11, 13

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 11

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) 3, 9, 10, 11

Prince v. Massachusetts, 321 U.S. 158 (1944) 11

Reed v. Gardner, 986 F.2d 1122 (7th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 389 (1993) 10

Roe v. Wade, 410 U.S. 113 (1973) 3, 8, 9, 10, 11, 12

Ruiz Romero v. Gonzalez Caraballo, 681 F. Supp. 123 (D.P.R. 1988) 10

Santosky v. Kramer, 455 U.S. 745 (1982) 11

Schweiker v. Wilson, 450 U.S. 221 (1981) 13

Silver v. Silver, 280 U.S. 117 (1929) 16

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 11

Sullivan v. Stroop, 496 U.S. 478 (1990) 13

United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) 13

Vance v. Bradley, 440 U.S. 93 (1979) 4, 12, 13

Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972) 3, 16, 17, 18

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES CITED

N.J.S.A. 2A:15-3 ..... i, 1, 5, 7
N.J.S.A. 2A:21-1 6
N.J.S.A. 2A:21-4 6
N.J.S.A. 2A:21-5 6
N.J.S.A. 2A:31-1 6
N.J.S.A. 2A:31-1 *et seq* ..... i, 1, 5
N.J.S.A. 26:6-57(b) 14
N.J.S.A. 34:15-13(f) 14

FEDERAL RULES CITED

Fed. R. Civ. P. 12(b)(6) 2, 10

COUNTERSTATEMENT OF THE CASE

On July 15, 1992, petitioner Karen F. Alexander delivered an eight and one-half month old stillborn fetus. (App. 57).[1] In July 1994, Alexander sought to commence in the Superior Court of New Jersey wrongful death and survival actions on behalf of the fetus' estate, alleging that the treating physicians and others had been negligent so as to cause the death of the fetus (App. 51, 57). On or about October 18 and 31, 1994, the Monmouth County Surrogate denied Alexander's request to issue Letters of Administration Ad Prosequendum on the grounds that the fetus was stillborn (App. 57).

On or about October 28, 1994, Alexander, Dennis Drazin, a New Jersey attorney, and Drazin & Warshaw, a professional corporation, filed a class action complaint in the United States District Court for the District of New Jersey naming as defendants Christine Todd Whitman, individually and in her official capacity as the Governor of New Jersey, Deborah T. Poritz, individually and in her official capacity as the Attorney General of New Jersey, and the surrogates of all twenty-one New Jersey counties (App. 49 to 74). Alexander alleged violations of her rights as well as those of the unborn fetus under the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution in that the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 *et seq.*, and the New Jersey Survival statute, N.J.S.A. 2A:15-3, as

---

[1] App. ___ refers to the appendix to the petition for writ of certiorari.

interpreted by the Supreme Court of New Jersey in *Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988), excluded rights of recovery on behalf of a stillborn fetus (App. 58 to 59; App. 63).[2]

On December 11, 1995, the State defendants filed a motion pursuant to Fed. R. Civ. P. 12(b)(6) to have the complaint dismissed with prejudice for failure to state a claim for which relief could be granted (App. 6). The county surrogate defendants thereafter moved to join in the State defendants' motion to dismiss with Alexander cross-moving for class certification and for summary judgment (*Ibid.*).

Following argument on March 6, 1995, the Honorable Mary Little Parell, United States District Judge, issued a memorandum opinion and order granting the State defendants' motion to dismiss (App. 35 to 48). The District Court further dismissed the motion for class certification and denied plaintiffs' motion for summary judgment (App. 48).

---

[2] Drazin and Drazin and Warshaw, P.C., raised identical constitutional challenges on behalf of clients seeking to bring wrongful death and survival actions in the New Jersey courts for the death of stillborn fetuses. (App. 67, 70). Because of those alleged constitutional deprivations, Drazin asserted that he and other similarly situated attorneys had "lost fees in their representation of their clients." (App. 68). He did not allege however that his or any other attorney's constitutional rights had been violated by operation of the challenged statutes. The District Court ultimately concluded (App. 39 to 42) and the Court of Appeals concurred (App. 28 to 29) that Drazin and the law firm lacked standing to assert the constitutional rights of their clients. No petition for certiorari has been filed for review of this ruling.

In so ruling Judge Parell determined that the New Jersey Legislature's decision to exclude unborn or stillborn fetuses from the definition of "persons" covered by the Wrongful Death Act and from the purview of the survival action statute did not impinge upon any "fundamental" familial or parental decisional interest but rather solely impacted on a parent's right to maintain a statutorily created cause of action based on tort (App. 44 to 45 n.9). As such, the District Court concluded that the statutes were subject to review under the rational basis standard of *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972), not the strict scrutiny analysis urged by Alexander. Applying the more deferential standard of review, the District Court determined that the New Jersey Legislature's limitation of the tort action bore a "rational relationship to the legitimate legislative goal of placing reasonable limits on wrongful death and survival actions in the State of New Jersey." (App. 47). Insofar as Alexander asserted violation of her unborn fetus's constitutional rights, the Court rejected the claim on the basis of the holding in *Roe v. Wade*, 410 U.S. 113, 158 (1973) that the word "person" as used in the Fourteenth Amendment did not "include the unborn." (App. 38 n.3).

On appeal the United States Court of Appeals affirmed, finding that this Court's rulings in *Roe v. Wade, supra,* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) – that unborn fetuses are not persons within the meaning of the Fourteenth Amendment – precluded any claim asserting an equal protection violation on behalf of Alexander's stillborn fetus (App. 12). As for Alexander's claim that the statutory exclusion impinged upon her fundamental interest

in a relationship with the unborn fetus, the Court found, without determining whether the pre-natal relationship was a "fundamental interest," that this relationship was not affected, only " . . . the ability to recover for the loss of that relationship." (App. 19). Moreover, although New Jersey law prevented Alexander from instituting certain kinds of lawsuits, she was ". . . not being denied the protection of the State's tort law" as she had a common law remedy under *Giardina v. Bennett, supra,* to recover for emotional distress and any injury resulting from medical malpractice leading to the stillbirth. (App. 20).

Having found that the New Jersey tort scheme did not impinge upon any relationship Alexander had had with her stillborn fetus, the Court of Appeals evaluated the substantive due process claim under the rational basis analysis adopted in *Vance v. Bradley,* 440 U.S. 93 (1979) and found the line the State had drawn in limiting tort recovery to be legitimate (App. 24 to 25). Under a similar analysis the Court of Appeals rejected the equal protection challenge (App. 25 to 28).[3]

---

[3] The brief concurring opinion of Judge Alito reported at 114 F.3d 1392, 1409 (3d Cir. 1997) has not been reproduced in the appendix to the petition for writ of certiorari. Judge Alito wrote:

> I am in almost complete agreement with the court's opinion, but I write to comment briefly on two points. First, I think that the court's suggestion that there could be "human beings" who are not "constitutional persons" (Maj.Op. 1401-02) is unfortunate. I agree with the essential point that the court is making: that the Supreme Court has held that a fetus is not a "person" within the meaning of the Fourteenth Amendment. However, the reference to constitutional non-persons, taken out of context, is capable of

This petition for certiorari followed.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS PROPERLY REJECTED THE WITHIN CHALLENGE TO THE CONSTITUTIONALITY OF N.J.S.A. 2A:31-1 *ET SEQ.* AND N.J.S.A. 2A:15-3 UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

By this action petitioner urges that the New Jersey Wrongful Death Act and its component survival actions, as interpreted by the Supreme Court of New Jersey in *Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988), violate the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution by denying recovery to the parents of a stillborn fetus whose death results from the negligence of third parties. As the Court of Appeals correctly concluded, the distinctions drawn by the New Jersey Legislature are reasonable and do not impinge upon any protectable constitutional rights of either the unborn or the parents of the stillborn fetus.

---

misuse. Second, I think that our substantive due process inquiry must be informed by history. It is therefore significant that at the time of the adoption of the Fourteenth Amendment and for many years thereafter, the right to recover for injury to a stillborn child was not recognized. *See Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139, 143 (N.J. 1988); *Smith v. Brennan*, 157 A.2d 497, 498 (N.J. 1960).

The New Jersey Wrongful Death statute in pertinent part states:

> When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.
>
> [N.J.S.A. 2A:31-1]

The purpose of the statute is to compensate those persons entitled to take intestate for "pecuniary injuries" resulting from the death of the "person . . . caused by a wrongful act, neglect or default . . . " N.J.S.A. 2A:21-1,-4 and -5; *see also Alfone v. Sarno*, 168 N.J. Super. 315, 321, 403 A.2d 9, 12 (App. Div.), *modified on other grounds*, 87 N.J. 99, 432 A.2d 857 (1979). ("The fundamental aim of our act is compensation for pecuniary losses suffered by the survivors of those killed by wrongful acts.") As such, the statute does not provide for punitive damages. *Hudgins v. Serrano*, 186 N.J. Super., 465, 476, 453 A.2d 218, 224 (App. Div. 1982). ("[A]n award in [a wrongful death action] . . . is not a matter of punishment for an errant defendant . . . but is rather a replacement for that which decedent would likely have provided and no more.") Nor does the statute allow for compensation for the emotional loss of or pleasure derived from companionship with the deceased. Rather, the statute limits compensatory damages to the economical value of the deceased's services,

viz., the pecuniary value of help with household chores, anticipated financial contributions, and the pecuniary value of the deceased's companionship, including advice and guidance. *Green v. Bittner*, 85 N.J. 1, 4, 12-14, 424 A.2d 210, 213, 215-216; *Carey v. Lovett*, 132 N.J. 44, 67-68, 622 A.2d 1279, 1291 (1993).

In addition to the compensatory damages provided by the Wrongful Death Act the survival action, found at N.J.S.A. 2A:15-3, allows for the recovery of funeral and burial expenses and "damages accrued during the lifetime of the deceased" by the executor of the estate or the administrator, if the person died intestate. While the Supreme Court of New Jersey in *Giardiana v. Bennett, supra* (as it had 24 years earlier in *Graf v. Taggert*, 43 N.J. 303, 204 A.2d 140 (1964)) concluded that the Legislature in enacting the Wrongful Death Act did not intend to include a fetus "as a being whose death can give rise to a claim for pecuniary loss by next-of-kin . . . ", 111 N.J. at 428, 545 A.2d at 147, the Court did recognize "that the medical malpractice causing an infant stillbirth constitutes a tort against the parents, entailing the direct infliction of injury, their emotional distress and mental suffering, for which they are entitled to recover compensatory damages." *Id.* at 413, 545 A.2d at 139. Under these circumstances the Court opined that recognition of entitlement to compensatory damages for parental emotional distress and mental suffering as a "direct and foreseeable impact on the family as a unit," *id.* at 18, 545 A.2d at 142, provided adequate protection for the "interests that are implicated in wrongful fetal death [and] [t]herefore, there is no need to modify th[e] [Wrongful Death] Act in order to effectuate its purpose." *Id.* at 428-429, 545 A.2d at 147.

The petitioner alleges however that her substantive due process rights as well as those of her stillborn fetus have been violated in that the subject New Jersey statutes impinge on a "protectable interest in her relationship" with her unborn child and that "enjoyment of [the relationship] [is] a fundamental constitutional right under the United States Constitution." (App. 58). Alexander further asserts a denial of her constitutional right to equal protection as well as her deceased fetus' right to equal protection by reason of the statutory grant of a cause of action to children and to mothers on behalf of their children's estates where the children were injured *in utero* by the tortious acts of third parties and are later born alive but denial of the cause of action to mothers of fetuses similarly injured *in utero* but stillborn. However, as the Court of Appeals concluded, she has failed to assert a legally viable claim on any of the grounds asserted.

A. A "Person" Under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 Does Not Include an Unborn or Stillborn Fetus.

To the extent that petitioner alleges a violation of her unborn child's Fourteenth Amendment rights, she ignores this Court's rulings as to the meaning of the word "person" in the Fourteenth Amendment. Thus, in 1973 the Court rejected the argument advanced by the State of Texas and *amici curiae* that an unborn fetus was a "person" within the language and meaning of the Fourteenth Amendment." *Roe v. Wade*, 410 U.S. 113, 156, 159 (1973). The Court stated clearly that "the word 'person' as used in the Fourteenth Amendment does not include the

unborn." 410 U.S. at 158. Notably, neither the dissenting opinion of then Justice Rehnquist in *Roe* nor the opinions of any of the Justices in the Court's most recent reexamination of the underpinnings of the *Roe* ruling have questioned the correctness of the earlier ruling. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). See in particular, the opinion of Justice Stevens, concurring in part, dissenting in part, 505 U.S. at 913-914.

> The *Court in Roe carefully considered, and rejected the State's argument "that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment."* 410 U.S., at 156. After analyzing the usage of "person" in the Constitution, the *Court concluded that the word "has application only postnatally." Id.* at 157. Commenting on the contingent property interests of the unborn that are generally represented by guardians ad litem, the Court noted: "Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense." *Id.* at 162. Accordingly, an abortion is not "the termination of life entitled to Fourteenth Amendment protection." *Id.* at 159. *From this holding, there was no dissent, see id., at 173; indeed, no member of the Court has ever questioned this fundamental proposition.* Thus, as a *matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life."* This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy. [emphasis added].

Consistent with *Roe's* holding, the Federal courts have similarly rejected the claim that a fetus is a person or citizen for purposes of 42 U.S.C. § 1983. *See McGarvey v. Magee-Womens Hosp.*, 340 F. Supp. 751, 754 (W.D. Pa. 1972), *aff'd*, 474 F.2d 1339 (3d Cir. 1973). *Accord Reed v. Gardner*, 986 F.2d 1122, 1127-28 (7th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 389 (1993); *Ruiz Romero v. Gonzalez Caraballo*, 681 F. Supp. 123 (D.P.R. 1988).

Thus, insofar as Alexander asserts the constitutional rights of her unborn child, these claims were properly dismissed as a matter of law pursuant to Fed. R. Civ. P. 12(b)(6).

B. As the Subject New Jersey Statutes Do Not Impinge on any Fundamental Rights Recognized by this Court and are Rationally Related to a Legitimate State Interest in Defining Tort Remedies the Court of Appeals Correctly Upheld the Statutes under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) Justice O'Connor comprehensively reviewed the rights recognized as fundamental by the Court. The Court noted that the "most familiar of the substantive liberties . . . are those recognized by the Bill of Rights." *Id.* at 847. The Court also explained that there is a "realm of personal liberty which the government may not enter," namely, those "personal decisions relating to marriage, procreation, contraception, family

relationships, child rearing, and education." *Casey, supra*, 505 U.S. at 847, 851.[4]

Here, however, as the Court of Appeals recognized, the subject New Jersey statutes purport only to grant a cause of action to the heirs of persons who have been injured by the tortious conduct of third parties. They do not, in any substantive manner, impinge upon any "personal decisions relating to . . . procreation . . . family relationships, [or] child rearing, *Planned Parenthood v. Casey, supra*, 505 U.S. at 851. Indeed, as this Court postulated in *Parham v. Hughes*, 441 U.S. 347, 358 n.12 (1979), "[i]t cannot seriously be argued that a statutory entitlement to sue for the wrongful death of another is itself a 'fundamental' or constitutional right." Moreover, insofar as the Supreme Court of New Jersey has recognized "that the medical malpractice causing an infant stillbirth constitutes a tort against the parents, *Giardina v. Bennett*,

---

[4] Those personal decisions have been addressed by the Court in *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942) (procreation); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (whether to bear or beget a child); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (family relationships); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (child rearing and education); and *Roe v. Wade, supra*, 410 U.S. at 152-53 (abortion). *Santosky v. Kramer*, 455 U.S. 745 (1982) and *Lassiter v. Dept. Of Soc. Services*, 452 U.S. 18 (1981) do not suggest any broader interpretation of the fundamental interests at stake. Insofar as both cases focused upon due process rights attendant to State actions to terminate parental rights-legal proceedings designed to extinguish the parental decision making role in its entirety – the Court's discussion of the parental liberty interest must be viewed in the context of that very unique setting.

supra, 111 N.J. at 413, 545 A.2d at 139, the State has provided compensation for the injury to "the family as a unit . . . [and] the strong and intimate bonds between the respective parents and their child." 111 N.J. at 418, 545 A.2d at 142. Accordingly, the Court of Appeals correctly rejected petitioner's contention that the challenged legislative classifications should be reviewed under a strict scrutiny analysis and upheld only if: 1) a compelling state interest was proffered and 2) it was established that the State's objective could not be achieved by means less restrictive of the affected fundamental right. *Roe v. Wade*, *supra*, 410 U.S. at 154.

Under the appropriate rational basis review, a statute will withstand substantive due process challenge if the state identifies a legitimate state interest that the legislature rationally could conclude was served by the statute. *See Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83 (1978). In so reviewing the challenged statutes "[t]he law need not be in every respect consistent with its aims to be constitutional," *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955), nor should the Court second guess the legislative branch's factual assumptions or policy choices in enacting the statute. *Id.* at 488.

It is thus the petitioner's burden to demonstrate that "the legislative facts on which the [statutory] classification is apparently based could not reasonably be conceived as true . . . " *Vance v. Bradley*, 440 U.S. 93, 111 (1979). Under this test and the identical standard of review applied to petitioner's equal protection argument, see *Federal Communications Comm. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) and *Massachusetts Board*

of Retirement v. Murgia, 427 U.S. 307, 312 n.3 and 4 (1976), the challenged statutes readily survive scrutiny as a reasonable legislative determination to set limits upon tort recovery for wrongful death.

As this Court has repeatedly recognized, legislation necessarily " 'requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line' " and that an argument that " 'the line might have been drawn differently at some points is a matter for legislative rather than judicial consideration.' " *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Moreover, the Court has held that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others," *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). Judicial intervention is therefore unwarranted unless the different groups created are "so unrelated to the achievement of any combination of legitimate purposes" that the legislature's actions must be deemed irrational. *Vance v. Bradley, supra*, 440 U.S. at 97. Thus, the rational basis standard requires only that such persons are classified "in a matter rationally related to legitimate government objectives." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). "The assumptions underlying the[ ] [legislative] rationales may be erroneous, but the very fact that they are 'arguable' is sufficient . . . " to defeat the constitutional challenge. *Vance v. Bradley, supra*, 440 U.S. at 112. *Accord Sullivan v. Stroop*, 496 U.S. 478, 485 (1990) (regulations must be upheld where "any state of facts reasonably may be conceived to justify it"). Indeed, rational basis review begins with a "presumption of validity against attack under the

Equal Protection Clause." *Parham v. Hughes, supra,* 441 U.S. at 351.

The legislative bases for the New Jersey Wrongful Death Act and the component survival action were commented upon by the Supreme Court of New Jersey in *Giardina, supra.* Because the language of the New Jersey Wrongful Death Act refers to the wrongful death of a "person," the Supreme Court reasoned that the New Jersey Legislature at the time of enactment adopted the common law concept of a person, which did not include a fetus. 111 N.J. at 421, 545 A.2d at 143. As the Court pointed out, that determination was supported by the Legislature's response when addressing the status of the unborn child in other settings. For example, the New Jersey Legislature has not relied on a "broad definition of 'person' " in other contexts, but rather has explicitly stated that a child *in esse* is included in the definition of children under the Workers' Compensation Act, N.J.S.A. 34:15-13(f), and a stillborn infant or fetus is included in the definition of decedent under the Uniform Anatomical Gift Act, N.J.S.A. 26:6-57(b). *Id.* Also, under the New Jersey Criminal Code, the "Legislature considered and rejected the opportunity to classify a fetus as a 'person.' " 111 N.J. at 422, 545 A.2d at 144.

The *Giardina* Court thus concluded that the Legislature's "intention [was] to provide a limited right of recovery in the face of the common-law bar against such actions." 111 N.J. at 424, 545 A.2d at 145. This objective was, in the Court's view, confirmed by the failure of the Legislature to take any action to amend the statute to reverse the earlier Supreme Court ruling in *Graf v. Taggart, supra,* declining to find a right of recovery for the

wrongful death of an unborn child under the Wrongful Death Act. *See Giardina, supra,* 111 N.J. at 425-426, 545 A.2d at 146.

In reaching its conclusion, the *Giardina* Court relied on *Justus v. Atchinson,* 565 P.2d 122 (Cal. 1977), a case in which the California Supreme Court addressed the issue of whether a fetus was a person for purposes of the wrongful death statute in effect in that State at the time. If the Court found that the California wrongful death statute did not provide a cause of action, then, as an alternative argument, the plaintiffs there claimed that the statute denied parents the equal protection of the laws. 565 P.2d at 133. After concluding that the statute did not provide a cause of action to the fetus, the Court reached the alternate argument. Although the California Supreme Court empathized with the parents, it found that "the distinction drawn by the statute between born and unborn children is not arbitrary, but bears a rational relationship to the legislative goal of placing reasonable limits on wrongful death actions in this state." *Ibid.*

So too here, as the *Giardina* Court found, in creating a statutory cause of action unknown at common law, the Legislature found it prudent to limit the class of intended beneficiaries by following the common law definition of person, a definition which did not include a fetus. That purpose was legitimate at the time of enactment and it remains legitimate today. *Cf. Duke Power Co. v. Carolina Envtl. Study Group, supra,* 438 U.S. at 82-84, 93-94 (where Court rejected substantive due process and equal protection challenge to ceiling on aggregate liability for nuclear accidents finding that ceiling was closely related to statute's purpose of avoiding excessive liability). Moreover,

while the present Supreme Court of New Jersey may have concluded that the damages that would occur "if fetal death qualified as an actionable wrongful death under the Act are not too speculative," *Giardina v. Bennett, supra,* 111 N.J. at 427, 545 A.2d at 147, the New Jersey Legislature may in fact share the contrary view of the members of the Court sitting in 1964 that the "anticipated evidence on the issue of damages for loss of pecuniary benefit in prenatal death cases is uniformily speculative." *Graf v. Taggert, supra,* 43 N.J. at 311, 204 A.2d at 145.

At bottom, however, petitioner's claim is nothing more than an argument that the Legislature's "line-drawing" could have been more inclusive. But statutes need not draw distinctions with "mathematical exactitude," *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976), even where the classification results in some inequality. *McGowan v. Maryland, supra,* 366 U.S. at 425-26; *Silver v. Silver,* 280 U.S. 117, 123-124 (1929) (Court rejects equal protection challenge to state statute denying tort recovery for negligence to persons carried gratuitously as a guest in an automobile; " . . . there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied – that the legislature must be held rigidly to the choice of regulating all or none.")

Moreover, as the Court of Appeals explained, this Court's decisions in *Levy v. Louisiana,* 391 U.S. 68 (1968), *Glona v. American Guarantee & Liab. Ins. Co.,* 391 U.S. 73 (1968) and *Weber v. Aetna Casualty & Sur. Co.,* 406 U.S. 164 (1972), relied so heavily upon by petitioner, do not undercut this conclusion and are "simply not relevant to the issues raised . . . " (App. 22 n.16).

First, in *Levy*, Louisiana's wrongful death and survival action statutes were being challenged on behalf of five illegitimate children for the wrongful death of their mother. The Louisiana statutes denied a wrongful death and survival cause of action to illegitimate children while granting a cause of action to legitimate children.

The *Levy* Court began its discussion with the undisputed legal premise that illegitimate children are "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 439. From that premise, the Court struck down the statute because the State's purpose – to discourage illegitimacy – was not a rational basis for denying tort recovery to illegitimate children. *See also Glona v. American Guarantee, supra,* 391 U.S. at 75. Thus, the Court held that illegitimate children should not be foreclosed from tort compensation because of the illicit behavior of their biological parents.

Similarly, in the companion case of *Glona v. American Guarantee,* a mother sued for the wrongful death of her illegitimate son who was killed in an automobile accident in Louisiana. The Court determined again that Louisiana's asserted basis in denying recovery – to discourage illegitimacy – was not a rational basis to deny the mother's wrongful death cause of action.

Weber v. Aetna, supra, is to the same effect. There the Court addressed a statutory scheme whereby illegitimate children were denied the right to recover under Louisiana's workers' compensation laws for the death of their father. The subject law allowed legitimate and acknowledged illegitimate children to recover on an equal basis; however unacknowledged illegitimate children could

only recover if there were not enough surviving dependents in other categories to exhaust the benefits. 406 U.S. at 168.

The *Weber* Court, relying on the *Levy* decision, found that the workers' compensation law effected a denial of equal protection. The *Weber* Court characterized *Levy* as holding that the fact of a child's birth out of wedlock poses no reasonable relationship to the purpose of the wrongful-death statutes which compensate children for the death of a mother. 406 U.S. at 168. The determinative factor, as in *Levy*, was the inability of both the father and the child to change the burden imposed by illegitimacy.[5]

There are two important factors which distinguish *Levy*, *Glona* and *Weber* from the facts of this case. First, all of those cases dealt with illegitimate children who, unlike the unborn or stillborn, *are* persons under the Fourteenth Amendment. Second, those persons – illegitimate children – were being denied benefits solely on the basis of their parents' conduct. Here, in contrast, the New Jersey tort scheme provides a remedy for both legitimate and illegitimate children and their parents; the statutory exclusion applies only to fetuses because unborn children are not legally persons.

Furthermore, the cases do not support the assertion of a fundamental right of tort recovery. *See Weber*, 406 U.S. at 183 (Rehnquist, J., dissenting). ("In spite of the Court's statement of a test, one part of which requires the

---

[5] The deceased father was unable to marry the illegitimate children's mother because his first wife was still alive and confined to a mental institution. *Weber*, 406 U.S. at 171 n.9.

determination of the extent to which 'fundamental personal rights' might be endangered by the Louisiana classification here, we are nowhere told in the opinion just what 'fundamental personal right' [ ] is involved.") *See also Duke Power, supra,* 438 U.S. at 88 n.32. Nor do these cases establish that the State must show a compelling interest in order for its statutory scheme to be upheld. In fact, in *Glona,* the Court found no *rational basis* for the statute. 391 U.S. at 75.

Certainly, then, because the New Jersey Legislature had a rational basis for not including a stillborn fetus in the class of persons encompassed by the challenged Acts, this Court should find that the statutes are constitutional and leave any further consideration of a revamping of the tort scheme to the New Jersey Legislature.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

PETER VERNIERO
Attorney General of New Jersey
Attorney for Respondents

By: ANDREA M. SILKOWITZ
Assistant Attorney General

Dated: September 19, 1997